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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOHN DOE 1, JOHN DOE 2, JOHN DOE 3,
JOHN DOE 4, JOHN DOE 5, JOHN DOE 6,
JOHN DOE 7, JOHN DOE 8, JOHN DOE 9,
JOHN DOE 10, JOHN DOE 11, JOHN DOE
12, JOHN DOE 13, and JOHN DOE 14
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

THE UNIVERSITY OF SAN FRANCISCO,
ANTHONY N. (AKA NINO) GIARRATANO,
and TROY NAKAMURA,

Defendant.

Case No. 3:22-cv-01559-LB

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR CLASS
CERTIFICATION**

Hearing: February 27, 2025
Time: 9:30 a.m.
Courtroom: B

Judge: Hon. Laurel Beeler
Trial Date: None Set

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MEMORANDUM OF POINTS AND AUTHORITIES

The USF Athletics department is significantly understaffed, and this was likely a contributing factor in the failure to detect, address or prevent the occurrence of some of the previous negative situations. Sufficient checks and balances in the departmental structure and staffing should be in place to ensure issues are identified and addressed before becoming a systemic problem. In speaking with the coaches and staff, it was clear that these checks and balances were not in place, and the oversight normally provided by sport administrators was lacking due to being understaffed and conflicts of interest that permitted undesired behavior to continue undetected or unchecked.

- Conclusion of outside investigators, in a USF-commissioned report dated August 28-29, 2023 and obtained through a subpoena on December 2, 2024.¹

I thought I should inform you about the letter that you may or may not have received from “the baseball team” about keeping G’s name in good standing This letter that was “signed” by a good chunk of the team should be completely null and void. Our signing of this “confidential” letter was not confidential at all. We were completely coerced into signing it and when half the team did not want to do it we were texted [and] called by this individual infuriated asking us “why have you not signed this? Do you even care about the team? The leaders of the team will know how much you care if you just sign it.”

- Email from a proposed class member (not a John Doe) to Athletic Director Joan McDermott, dated May 24, 2022.² The “individual” coercing players to sign the letter of support is now a declarant opposing class certification.³ This email was not produced in discovery until December 11, 2024.⁴

[REDACTED]

- Sworn statement of USF in its arbitration against Giarratano, dated February 23, 2023. This was not produced in discovery until December 11, 2024.⁵

I. INTRODUCTION

Reading Defendants’ papers in opposition to Plaintiffs’ motion for class certification, one could be forgiven for thinking Plaintiffs sought to certify a full-blown damages class for all purposes under Rule 23(b)(3). But that is not the motion before the Court, and substantially all of Defendants’ arguments against certification oppose a motion Plaintiffs did not bring. Defendants

¹ Declaration of Jonathan D. Selbin (“Selbin Decl.”), Ex. 1 at FERRIS0000181; Declaration of Michael von Klemperer (“MvK Decl.”) ¶ 3.

² Selbin Decl., Ex. 2 at USF_0115359.

³ Compare Selbin Decl., Ex. 2 with ECF No. 282-24 (USF Ex. 22).

⁴ MvK Decl. ¶ 4.

⁵ Selbin Decl., Ex. 3 at USF 0116110; MvK Decl. ¶ 5.

1 fail to rebut Plaintiffs' showing of numerosity, commonality, typicality, and adequacy under Rule
 2 23(a), and fail to demonstrate why issue certification under Rule 23(c)(4) is inappropriate or
 3 impracticable here. The proposed issues class should be certified.

4 As to Rule 23(a), Defendants' arguments are predicated largely upon declarations from
 5 absent class members who assert they were not harmed by the Coach Defendants' sexual
 6 misconduct. But USF knows that players have been "coerced into signing" statements in support
 7 of the Coach Defendants.⁶ That alone is reason enough for the Court to doubt the "support"
 8 expressed in these declarations. But there's more: three USF administrators and two experts (one
 9 retained by USF itself) acknowledged that [REDACTED]

10 [REDACTED].⁷

11 The declaration USF submitted from current Plaintiff Doe 7 is particularly troubling. USF's
 12 counsel appears to have contacted an adverse pro se party with live claims against their client, and
 13 drafted a declaration from him containing statements against his interest in this case, not to mention
 14 demonstrably false, likely in violation of California ethical rules (as addressed below). USF's
 15 counsel also put Plaintiffs' counsel in the difficult position of having to rebut a former client's
 16 sworn statements.⁸ In addition to obtaining a preliminary opinion from an ethics expert, Plaintiffs
 17 served discovery on USF on these issues and await its production. The Court may need to convene
 18 an evidentiary hearing. In the meantime, the circumstances around USF's conduct with respect to
 19 Doe 7's declaration provide further reason to question all of the declarations.

20 As to Rule 23(c)(4), Defendants focus on purported differences in the way each proposed
 21 class member was (or was not) harmed by the Coach Defendants' sexual misconduct. USF argues,
 22 for example, that "[e]ven if they prevailed at the class stage, Plaintiffs would still need to prove
 23 individual harm."⁹ But this is not an argument against issue certification—it is a correct statement

24 _____
 25 ⁶ Selbin Decl., Ex. 2 at USF_0115359.

26 ⁷ *Id.*, Ex. 4 (Nelson Dep. Tr.) at 147:8-10, 40:5-21; *id.*, Ex. 5 (Arb. Tr. Vol. IX) at 2218:13-15; *id.*,
 27 Ex. 6 (Arb. Tr. Vol. VIII) at 2102:25-2103:17; *id.*, Ex. 7 (Cross Dep. Tr.) at 214:9-11.

28 ⁸ Plaintiffs' counsel do not take these issues lightly. As discussed below, they retained an expert in
 California legal ethics to provide an opinion on their own and USF's counsel's conduct, and to
 guide them on addressing this issue in a manner that complies with their obligations to a former
 client under the California Rules of Professional Conduct. *See infra* at 29.

⁹ USF Opp'n at 10.

1 of how Rule 23(c)(4) issue certification operates. Plaintiffs already made clear—but reiterate again
 2 now—that individualized damages (or lack thereof) can and should be addressed on an individual
 3 basis for each class member, after common liability issues are resolved. In endorsing this
 4 bifurcation of common liability issues and individual damages, the Ninth Circuit affirmed that “no
 5 matter how individualized the issue of damages may be . . . it would drive a stake through the heart
 6 of the class action device to require that every member of the class have identical damages.”
 7 *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167-68 (9th Cir. 2014) (cleaned up).¹⁰ And key
 8 discovery—produced only *after* Plaintiffs moved for class certification and *after* the Court set a
 9 deadline for the parties to confer regarding extensions to the briefing schedule—has only confirmed
 10 that common evidence will prove (or disprove) the common liability issues identified in Plaintiffs’
 11 motion. This discovery included previously unknown incidents of sexual misconduct as well as
 12 widespread recognition—both internally at USF and by outside investigators hired by USF—of the
 13 widespread and longstanding structural failures at USF that permitted the Coach Defendants’
 14 rampant sexual misconduct to go unchecked for decades.¹¹

15 Curiously, USF opens its opposition by noting that other university cases involving sexual
 16 misconduct (neither cited in Plaintiffs’ motion) “did not receive class certification until after
 17 settlement, when defendants supported certification of a settlement class.”¹² True: when confronted
 18 with the horrifying reality that students had been harmed on their watch, other universities opted to
 19 work cooperatively to provide some measure of recompense and reform their policies and practices.
 20 USF, by contrast, has rejected all attempts by Plaintiffs to even engage in such discussions and
 21 opted instead to call the *thirteen* players spanning *twenty* years who bravely came forward (and
 22 their counsel) liars and frauds.

23 At bottom, the Court’s job on class certification is “to select the method best suited to
 24 adjudication of the controversy fairly and efficiently.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*,
 25 568 U.S. 455, 460 (2013) (cleaned up); *see also* Fed. R. Civ. P. 1 (Rules are to “be construed,
 26 administered, and employed by the court and the parties to secure the just, speedy, and inexpensive

27 ¹⁰ Quoting *Butler v. Sears, Roebuck and Co.* (“*Butler II*”), 727 F.3d 796, 801-02 (7th Cir. 2013).

28 ¹¹ *See infra* § II (detailing recently produced evidence).

¹² USF Opp’n at 11.

determination of every action and proceeding”). Plaintiffs respectfully submit that Rule 23(c)(4) certification is the fairest and most efficient way to move this case forward to resolution.

II. CLASS EVIDENCE

Contrary to USF’s contention, class discovery has not “been ongoing for more than a year.”¹³ Though the case was filed in 2022, USF’s document productions did not begin until April 29, 2024 and were slow thereafter.¹⁴ USF is *still* producing documents Plaintiffs identified (back on September 19, 2024) as key class discovery.¹⁵ USF admits that its most recent production on January 28, 2025—nine days ago—was of documents “prioritized for class certification” last fall.¹⁶ And despite committing to make rolling productions of class discovery every two weeks, this was the first custodial production USF has made in two and a half months.¹⁷ Giarratano did not *even begin* production of ESI until February 3, 2025—three days ago. Nakamura, to his credit, has taken his discovery obligations more seriously than either USF or Giarratano.¹⁸

Nevertheless, Plaintiffs remain “eager to move for class certification.”¹⁹ There is already sufficient evidence reflecting a decades-long pattern of abuse by the Coaches, as well as USF’s uniform failure to act either to prevent it or respond to it. However, because USF repeatedly asserts that Plaintiffs have “no evidence” regarding the common issues they seek to certify,²⁰ Plaintiffs include here some of the additional class discovery USF is only now producing. To be clear: Plaintiffs cite *only* documents and testimony produced *after* Plaintiffs moved for class certification and *after* the Court’s deadline for the parties to confer on the briefing schedule.²¹ The vast majority

¹³ USF Opp’n at 11.

¹⁴ See ECF Nos. 209, 228, 236 (detailing USF’s discovery delays).

¹⁵ See ECF No. 236 at 4-5 (detailing requested key class discovery).

¹⁶ MvK Decl. ¶ 6.

¹⁷ *Id.* ¶ 7. Inexplicably, USF also failed to collect and produce text messages from any custodians despite this being a critical source of relevant information and agreeing to do so in its arbitration against Giarratano. *Id.* ¶ 8. Plaintiffs flagged this issue for USF last summer but USF has repeatedly refused to engage and motion practice is likely necessary. *Id.*

¹⁸ *Id.* ¶¶ 9-10. USF’s and Giarratano’s conduct stands in stark contrast to Plaintiffs’ conduct. Indeed, they were able to cherry-pick text messages for irrelevant “gotcha” soundbites in their oppositions precisely because Plaintiffs produced *all* of their ESI more than six months ago. *Id.* ¶ 11.

¹⁹ ECF No. 236 at 2.

²⁰ USF Opp’n at 17, 22.

²¹ This reply does not include anything from the large production of documents “prioritized for class certification” that USF produced only days go, or any of Giarratano’s ESI produced only days ago, which Plaintiffs of course could not review in time to incorporate. MvK Decl. ¶¶ 6, 9.

1 of this new, damning evidence comes from arbitration materials USF attempted to withhold,
 2 necessitating a Court order compelling their production.²² This discovery confirms the propriety of
 3 issue certification here. Plaintiffs—and the Court—have every reason to believe more is coming.

4 **A. USF Lacks a Functioning Title IX Process.**

5 Since Plaintiffs’ motion was filed, USF and third parties produced critical documents—
 6 including the findings of an internal investigation of USF’s athletics department—that reflect
 7 longstanding, structural failings with USF’s Title IX process. None of these documents were
 8 available to Plaintiffs’ expert Robert Boland when he submitted his original report.²³ Based on his
 9 review of documents produced since that report, Boland submits here a supplemental expert report
 10 regarding these systemic failures. Boland—who served as Athletics Integrity Officer at Penn State
 11 in the wake of the Jerry Sandusky scandal—concludes: “New evidence demonstrates that not only
 12 were USF’s policies and trainings inadequate, but the entire structure of its Athletic Department
 13 and administration all but ensured that misconduct was not identified, reported, or prevented. This
 14 further compounded the culture of abuse.”²⁴

15 Boland is not alone in reaching this conclusion. In the wake of this lawsuit, USF hired a
 16 team of outside investigators to assess its athletics department. USF retained Mitchell Malachowski
 17 (Faculty Athletic Representative, University of San Diego), Ellen Ferris (Senior Associate
 18 Commissioner, American Athletic Conference), and Bruce Rasmussen (Former Athletic Director,
 19 Creighton University) to conduct the investigation. In August 2023, this team concluded: “The USF
 20 Athletics department is significantly understaffed, and this was likely a contributing factor in the
 21 failure to detect, address or prevent” abuse. They noted that USF lacks “[s]ufficient checks and
 22 balances in the departmental structure and staffing [that] should be in place to ensure issues are
 23 identified and addressed before becoming a systemic problem,” which together with “conflicts of
 24 interest” in the department “permitted undesired behavior to continue undetected or unchecked.”²⁵

25 _____
 26 ²² MvK Decl. ¶ 13. Though the Court ordered their production on November 25, 2024, and the
 27 documents should have been readily accessible, USF and Giarratano failed to produce any
 28 arbitration documents for weeks, and USF did not complete production until January 28, 2025. *Id.*

²³ *Id.* ¶ 14.

²⁴ Selbin Decl., Ex. 20 (Boland Suppl. Rep.) ¶ 9.

²⁵ *Id.*, Ex. 2 at USF_0115359.

1 Testimony by USF administrators confirms the scope of the department's structural failures.
 2 When McDermott—head of the department—was asked whether she has “ [REDACTED]

3 [REDACTED],” she answered: “ [REDACTED]

4 [REDACTED]²⁶ Katrina Garry, USF's Title IX Officer, complained to Human Resources Director Diane
 5 Nelson that she “ [REDACTED]

6 [REDACTED]²⁷ USF's President, Fr. Paul Fitzgerald testified: “ [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]²⁸ Indeed, though

10 USF continues in this litigation to downplay the significance of the complaints the department
 11 ignored over the years (beginning in 2000), McDermott does not: [REDACTED]

12 [REDACTED]²⁹

13 USF's structural failures had real, tragic consequences for the baseball team. For example,
 14 in a previously undisclosed Title IX complaint, a member of the baseball team informed USF's
 15 Title IX Officer that: “ [REDACTED]

16 [REDACTED]³⁰ In response to this complaint, [REDACTED]

17 [REDACTED]³¹ He explained to

18 McDermott that [REDACTED]

19 [REDACTED]³² Boland opines: “USF's failure to address Giarratano's [REDACTED]

20 [REDACTED] reflects a gross failure of

21 oversight. Any reasonable administrator would have understood that Giarratano was placing the

22 University, and the student-athletes in his care, at extraordinary risk. In my experience, coaches,

23
 24 ²⁶ Selbin Decl., Ex. 8 (McDermott Dep. Tr. Vol. 2) at 282:2-5.

25 ²⁷ *Id.*, Ex. 10 (Arb. Tr. Vol. X) at 2601:8-2602:5, 2602:11-13.

26 ²⁸ *Id.*, Ex. 5 (Arb. Tr. Vol. IX) at 2384:9-17.

27 ²⁹ *Id.*, Ex. 5 (Arb. Tr. Vol. IX) at 2224:19-25.

28 ³⁰ *Id.*, Ex. 11 (Giarratano Dep. Tr. Vol. 1) at 251:3-5. In the arbitration, USF offered Doe 7 to testify
 “ [REDACTED] ”
Id., Ex. 15 (Vartain Decl.) ¶ 9.

³¹ Selbin Decl., Ex. 11 (Giarratano Dep. Tr. Vol. 1) at 259:14-260:3.

³² *Id.* at 262:3-18.

1 including a national championship winning coach at Penn State, have been terminated for less
 2 severe [REDACTED]³³

3 **B. Plaintiffs Continue to Uncover New Evidence of the Coach Defendants’**
 4 **Abuse, as Well as USF’s Knowledge and Cover-Up of that Abuse.**

5 Plaintiffs’ motion included extensive documentation of the Coach Defendants’ sexual
 6 misconduct and USF’s knowledge of it. This evidence included declarations, deposition testimony,
 7 and USF-internal documentation—all of it completely ignored by Defendants.³⁴ Since the motion
 8 was filed, USF has produced even more evidence of the Coach Defendants’ pervasive sexual
 9 misconduct, and USF’s awareness of the problem.

10 Though Defendants (and their declarants) claim Plaintiffs’ allegations of sexual misconduct
 11 are entirely fabricated, the record proves otherwise. When asked [REDACTED]
 12 [REDACTED]—an
 13 accusation Defendants routinely lob at Plaintiffs in this litigation—USF Human Resources Director
 14 (Nelson) testified: “[REDACTED]
 15 [REDACTED].”³⁵ Nelson also testified to the following “[REDACTED]” of USF’s investigation:

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]³⁶

20 Father Fitzgerald similarly testified that Giarratano—himself a mandated reporter under Title IX—
 21 “[REDACTED]
 22 [REDACTED].”³⁷ When asked whether Giarratano had [REDACTED]
 23 [REDACTED], Father Fitzgerald testified: “[REDACTED]
 24 [REDACTED]

25 ³³ Selbin Decl., Ex. 20 (Boland Suppl. Rep.) ¶ 17.

26 ³⁴ See Mot. at 2-13 (detailing evidence). The only Defendant to really engage this evidence was
 27 Nakamura, but he did so only to argue (incorrectly) that it is inadmissible. See *infra* § III.B.2.d.

28 ³⁵ Selbin Decl., Ex. 4 (Nelson Dep. Tr.) at 111:12-19.

³⁶ *Id.*, Ex. 10 (Arb. Tr. Vol. X) at 2503:7-24.

³⁷ *Id.*, Ex. 5 (Arb. Tr. Vol. IX) at 2333:7-10.

1 [REDACTED]³⁸ USF's counsel also
 2 told the arbitrator under "penalty of perjury" that "the evidence will show that Claimant
 3 [Giarratano] received a complaint from [a player] in March *before* the lawsuit, and suppressed it."³⁹

4 USF's recent productions also reveal instances of sexual misconduct not previously in the
 5 record. USF's former Athletics Director (McDermott) testified that [REDACTED]

6 [REDACTED]
 7 [REDACTED]⁴⁰
 8 Another parent (not of a John Doe) testified that [REDACTED]

9 [REDACTED].⁴¹ Nelson testified to additional incidents of Nakamura [REDACTED]
 10 including "[REDACTED]"—and to additional examples of [REDACTED]

11 including [REDACTED]
 12 [REDACTED] and one
 13 with Nakamura [REDACTED]

14 [REDACTED]⁴²

15 Finally, new statistical documentation underscores USF's notice of a serious problem on
 16 the baseball team. A May 2021 report from Jeremy Howell, USF Faculty Athletic Representative,
 17 charts graduation rates between 2004 and 2020. The chart reflects substantial dips throughout
 18 Giarratano's tenure. In his analysis of the chart, Howell notes that "baseball now has the lowest
 19 graduation rate in the athletic department."⁴³ Yet USF suggests in its opposition that in the team's
 20 history, there are only two examples—conveniently, Does 1 and 3—of players being "run-off" the
 21 team in retaliation for refusing to condone the Coaches' sexual misconduct.⁴⁴

22 **C. USF Has Internally Questioned the Reliability of Absent Class Member**
 23 **Support Statements, and this Court Should as Well.**

24 Defendants ask the Court to credit 21 absent class member declarations despite several

25 ³⁸ Selbin Decl., Ex. 10 (Arb. Tr. Vol. X) at 2426:22-2427:5 (emphasis supplied).

26 ³⁹ *Id.*, Ex. 15 (Vartain Decl.) ¶ 13 (emphasis in original).

27 ⁴⁰ *Id.*, Ex. 9 (McDermott Dep. Tr. Vol. 1) at 200:18-201:16.

28 ⁴¹ *Id.*, Ex. 12 (Arb. Tr. Vol. I) at 275:13-276:6.

⁴² *Id.*, Ex. 4 (Nelson Dep. Tr.) at 113:24-25, 50:10-23.

⁴³ *Id.*, Ex. 13 at FERRIS0000090.

⁴⁴ USF Opp'n at 23.

1 glaring issues, all of them known to USF. Indeed, when presented with a nearly identical show of
 2 support during USF's internal investigation into the Coach Defendants, USF *did not credit the*
 3 *statements*. This Court should not either.

4 First, USF is well-aware that since this litigation was filed, absent class members have been
 5 "coerced" into signing onto support for the Coach Defendants. On May 24, 2022, a class member
 6 wrote to Athletic Director Joan McDermott, and alerted her to the fact that a letter she had received
 7 from "the baseball team" in support of Giarratano "should be completely null and void" because
 8 players "were completely coerced into signing it and when half the team did not want to do it."⁴⁵
 9 This "half of the team" was pressured to sign through text messages and phones calls from an
 10 individual who now appears as a declarant in opposition to class certification.⁴⁶ And in an
 11 astounding display of the extent to which Defendants distort facts about these "statements,"
 12 Giarratano identifies the player who reported this false statement to McDermott as not only a
 13 *supporter* but the statement's *author*.⁴⁷ This entire exchange—from submission to McDermott to
 14 distortion in this briefing—underscores that these displays of "support" are not reliable.

15 Second, USF *internally* acknowledges the culture of fear, silence, and coercion that
 16 pervaded the team and motivated "support" for the Coaches. USF's Human Resources Director
 17 (Nelson) testified that there was a [REDACTED] and that players
 18 were taught [REDACTED].⁴⁸ McDermott likewise acknowledged that players were

19 [REDACTED]
 20 [REDACTED]⁴⁹ She " [REDACTED]
 21 [REDACTED]" but [REDACTED]
 22 [REDACTED]⁵⁰

23 Third, USF *internally* acknowledges that support statements born out of this culture should
 24

25 ⁴⁵ Selbin Decl., Ex. 2 at USF_0115359.

26 ⁴⁶ Compare Selbin Decl., Ex. 2 with ECF No. 282-24 (USF Ex. 22).

27 ⁴⁷ See Giarratano Opp'n at 8, Ex. L. Giarratano's gross misrepresentation of the document is
 28 apparent on its face. *Id.*

⁴⁸ Selbin Decl., Ex. 4 (Nelson Dep. Tr.) at 147:8-10.

⁴⁹ *Id.*, Ex. 5 (Arb. Tr. Vol. IX) at 2218:13-15.

⁵⁰ *Id.* at 2102:25-2103:17.

1 not be credited. Charles Cross, Vice President of Business and Finance, testified that [REDACTED]

2 [REDACTED]
3 [REDACTED]⁵¹ Nelson, too, testified that [REDACTED]

4 [REDACTED]
5 [REDACTED] She went on: “ [REDACTED]

6 [REDACTED]⁵² The same is true of the declarations
7 submitted in opposition to class certification. Nearly all of them contain the same “cookie-cutter”
8 paragraphs, down to the same paragraph numbering. For example, eight of the declarations have a
9 paragraph (usually paragraph six) that reads *exactly*:

10 I did not have the same or even a similar experience playing baseball at USF
11 that Plaintiffs allege they had. Nor did I experience or witness the type of
12 sexualized and/or discriminatory environment that Plaintiffs allege they
13 suffered, nor was I (or anyone I knew of) ever retaliated against by USF’s
14 coaching staff or USF administration for anything whatsoever. The experiences
Plaintiffs allege are not typical to my own. Nor do I believe that Plaintiffs’
experiences were common to the experiences shared by other members of
USF’s baseball team who are included in the proposed class.⁵³

15 Others contain exactly this language except that, and notably, the declarant apparently insisted that
16 the drafter remove the piece about never witnessing or experiencing retaliation.⁵⁴ And the
17 remainder have very similar versions of the same sentiment.⁵⁵

18 Fourth, Doe 7’s declaration illustrates that USF and its counsel are more than willing to
19 distort the truth to manufacture support for USF’s position.⁵⁶ When it suited USF in its arbitration
20 against Giarratano, USF called Doe 7 to testify to the *exact opposite* of what now appears in his
21 declaration.⁵⁷ Ahead of calling Doe 7 to testify, on July 12, 2024, USF’s counsel submitted a

22 ⁵¹ Selbin Decl., Ex. 7 (Cross Dep. Tr.) at 214:9-11.

23 ⁵² *Id.*, Ex. 4 (Nelson Dep. Tr.) at 40:5-21.

24 ⁵³ ECF No. 282-1 at Giosso Decl. ¶ 6; Jones Decl. ¶ 6; Keaschall Decl. ¶ 6; Tolsma Decl. ¶ 6;
Westerman Decl. ¶ 6; Young Decl. ¶ 6; Sittauer Decl. ¶ 7; ECF No. 282-24 at Roe Decl. ¶ 8.

25 ⁵⁴ ECF No. 282-1 at Lopez Decl. ¶ 8; Zahn Decl. ¶ 7.

26 ⁵⁵ ECF No. 282-1 at Santerre Decl. ¶ 6; Corderio Decl. ¶ 7; Eaton Decl. ¶ 7; Mott Decl. ¶ 6; Knoble
Decl. ¶ 7; Cirbo Decl. ¶ 6; Bond Decl. ¶ 9; Hinkle Decl. ¶ 6; Cimber Decl. ¶ 5; Della Cella Decl.
¶ 5; McGuigan Decl. ¶ 8.

27 ⁵⁶ See *infra* at 29 (detailing Plaintiffs’ counsel’s retention of an expert in California legal ethics to
address the unfortunate situation USF has created).

28 ⁵⁷ Needless to say, Plaintiffs’ counsel’s conversations with Doe 7 hewed closer to his testimony
than to the false declaration USF encouraged. Declaration of Beth Fegan (“Fegan Decl.”) ¶¶ 13-33.

1 declaration “under penalty of perjury” explaining Doe 7 was “expected to recount instances of
 2 Nakamura’s regular engagement in sexualized conduct.”⁵⁸ On July 23, 2024, USF called Doe 7 to
 3 testify.⁵⁹ USF’s counsel *from this lawsuit*, attended the proceedings solely for Doe 7’s testimony
 4 and was thus aware of his testimony in the arbitration that supported Plaintiffs in this matter.⁶⁰

5 During the arbitration, Doe 7 testified that he witnessed:

- 6 - [REDACTED] Selbin
Decl., Ex. 14 (Arb. Tr. Vol. VII) at 1680:9-1681:1.
- 7 - [REDACTED]
8 *Id.* at 1707:1-7; 1785:24-1786:2.
- 9 - [REDACTED], *id.* at 1683:2-9, [REDACTED]
10 *id.* at 1797:5-16.
- 11 - [REDACTED] *Id.* at
12 1707:13-17.
- 13 - [REDACTED] *Id.* at 1707:17-18; 1707:22-1708:3.
- 14 - [REDACTED] *id.* at 1692:3-9,
15 [REDACTED] *id.* at 1694:3-5.
- 16 - [REDACTED] *Id.* at 1711:1-2.

17 Again, USF’s counsel *in this litigation* was present for all of this testimony. Yet this same counsel,
 18 some six months later, encouraged this individual to submit a sworn statement avowing that such
 19 things *never occurred*.⁶¹ This calls into question similar claims by other declarants that they “never
 20 witnessed” the sort of abuse Plaintiffs allege here.

21 Fifth, an expert retained *by USF* in its arbitration against Giarratano testified that [REDACTED]

22 [REDACTED] The

23 ⁵⁸ Selbin Decl., Ex. 15 (Vartain Decl.) ¶ 5.

24 ⁵⁹ *Id.*, Ex. 14 (Arb. Tr. Vol. VII).

25 ⁶⁰ *Id.* at 1608:12-16; 1666:19-20; 1799:20-21. Despite representing USF, an adverse party to Doe
 26 7 in this lawsuit, USF’s counsel purported to appear on his behalf in the arbitration. This was a
 27 violation of Rule of Professional Conduct 1.7(d)(3): counsel can only represent adverse clients
 28 where “the representation does not involve the assertion of a claim by one client against another
 client represented by the lawyer in the same litigation or other proceeding before a tribunal.”

⁶¹ See ECF No. 282-22, ¶ 13 (“I never observed any USF coach exposing himself to any USF player
 or any other coach.”); *id.* ¶ 15 (“I never saw any of the alleged sexual acts by Coach Nakamura,
 referenced in the complaint, for instance . . . being forced to perform sexualized skits . . . I never
 saw or engaged in any skits that were sexual in nature.”).

expert—Sandy Barbour—was shown [REDACTED]

[REDACTED]” She observed that [REDACTED]

She testified that, in her expert opinion, [REDACTED]

[REDACTED]⁶³ She further explained that [REDACTED]

Finally, Plaintiffs’ expert Boland similarly opines that the purported show of support from declarants is unsurprising, in context. He explains that “team dynamics commonly minimize or deny misconduct,” and that this “is amplified when the conduct involves hazing or sexual, taboo, or embarrassing matters.”⁶⁵ Boland roots this observation in “nearly 60 investigations in collegiate or Olympic sports . . . whether at Penn State, as an independent reviewer, as a member of USA Weightlifting’s Ethics Committee, or as an attorney,” from which he could not “recall a single matter where misconduct was found to have occurred where a witness or reporter did not receive some pressure from others on the team to either deny or conform their testimony to that of the group or coach or suffer either threat of being ostracized from the group or a physical threat.”⁶⁶

III. ARGUMENT

Defendants do not credibly dispute that this case meets all requirements for Rule 23(c)(4) issue certification. Instead, they focus primarily on declarations that have no bearing on the issues to be certified and the veracity of which the Court has every reason to question. Classwide determination of the common issues here is the best tool to fairly and efficiently adjudicate the common issues for Plaintiffs and the class. If—and only if—there is a liability finding on the common issues, absent class members would still be required to come forward (as Plaintiffs have) to establish their damages. As detailed in Plaintiffs’ motion, many courts throughout the country—including the Ninth Circuit—have endorsed this process. *See* Mot. at 24-25 (citing, among other authorities, *Avilez v. Pinkerton Gov’t Servs., Inc.*, 596 F. App’x 579, 579-80 (9th Cir. 2015);

⁶² Selbin Decl., Ex. 6 (Arb. Tr. Vol. VIII) at 1969:5-13.

⁶³ *Id.* at 1969:22-1970:3.

⁶⁴ *Id.* at 1970:5-9.

⁶⁵ *Id.*, Ex. 20 (Boland Suppl. Rep.) ¶ 35.

⁶⁶ *Id.* ¶ 36.

1 *Jimenez*, 765 F.3d at 1168; *Levy v. Medline Indus., Inc.*, 716 F.3d 510, 515 (9th Cir. 2013)).

2 **A. Plaintiffs’ Proposed Class Is Valid**

3 Defendants argue that Plaintiffs’ proposed class is “invalid” and/or “overbroad” because it
4 includes members who lack standing or have time-barred claims. These arguments are wrong on
5 both the facts and the law.

6 *First*, Defendants’ standing argument is predicated entirely upon the declarations submitted
7 with Defendants’ oppositions, in which certain class members claim not to have been harmed.⁶⁷
8 The argument is therefore based on a false premise: that Plaintiffs must show *every single class*
9 *member* suffered the same degree of injury as the named Plaintiffs. This is not the law.

10 “[N]amed plaintiffs who represent a class ‘must allege and show that they personally have
11 been injured, not that injury has been suffered by other, unidentified members of the class to which
12 they belong.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) (quoting *Simon v. E. Ky.*
13 *Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)).⁶⁸ And it is well-settled that the existence of
14 uninjured class members does not defeat class certification. *Tyson Foods, Inc. v. Bouaphakeo*, 577
15 U.S. 442, 460-61 (2016); *see also Heredia v. Sunrise Senior Living, LLC*, No. 22-55332, 2023 WL
16 4930840, at *1 (9th Cir. Aug. 2, 2023) (rejecting argument regarding “uninjured class members”
17 and affirming that “[a] possible need for individualized damages calculations does not . . . defeat
18 class action treatment”). Indeed, in *Olean*—cited by USF—the Ninth Circuit “reject[ed] the []
19 argument that Rule 23 does not permit the certification of a class that potentially includes more
20 than a de minimis number of uninjured class members.” *Olean Wholesale Grocery Coop., Inc. v.*
21 *Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022). All the more so here: unlike the plaintiffs
22 in *Tyson* and *Olean*, Plaintiffs do not seek Rule 23(b)(3) certification for all purposes.

23 Here, there is also simply no basis to conclude that the proposed class includes a “great
24 number” of uninjured class members.⁶⁹ Plaintiffs have amassed substantial evidence that the Coach

25 _____
26 ⁶⁷ USF Opp’n at 11-12; Nakamura Opp’n at 14-15; Giarratano Opp’n at 12.

27 ⁶⁸ For good reason—as their harms are well-documented—Defendants do not argue that Plaintiffs
28 lack Article III standing. *Cf. Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th
Cir. 2014) (affirming plaintiffs possessed Article III standing to represent a class of other female
student-athletes because their own “prospects for competing were hampered” by discrimination).

⁶⁹ USF Opp’n at 11.

Defendants' sexual misconduct was severe and pervasive.⁷⁰ And as set forth above, there is cause for serious concern regarding the "declarations" submitted with Defendants' motions, including that USF was long ago notified that participation in such shows of support are not voluntary, but that players are "completely coerced into signing" such statements.⁷¹ For that reason, USF has *itself not credited* similar statements from absent class members, and multiple experts (including USF's) agree they are unreliable.⁷² See also *supra* § II.C (detailing other problems with the declarations, including that USF knowingly submitted false statements from Doe 7).

Relatedly, Defendants argue that Plaintiffs' class definition is overbroad because it may include uninjured class members. For example, USF cites *Berndt* for the proposition that Plaintiffs must use a class definition that "limit[s] itself to class members who have actually suffered harm by reason of defendants' alleged harassment." USF Opp'n at 12 (quoting *Berndt v. Cal. Dep't of Corr.*, No. C 03-3174 PJH, 2012 WL 950625, at *11 (N.D. Cal. Mar. 20, 2012)). Since *Berndt* was decided, however, the Ninth Circuit has unambiguously cautioned that such a definition would constitute an impermissible fail-safe class. See, e.g., *Olean*, 31 F.4th at 669 n.14 ("A court may not, however, create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct.") (citing *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016)). The Coach Defendants' arguments are predicated upon similarly stale and improper fail-safe authorities.⁷³ Giarratano also appears to argue that the class is somehow not ascertainable.⁷⁴ Setting aside that ascertainability is not a requirement in the Ninth Circuit,⁷⁵ the class here is readily identifiable through annual baseball rosters. Indeed, Giarratano had no trouble

⁷⁰ See Mot. at 2-13; *supra* § II.

⁷¹ Selbin Decl., Ex. 2 at USF_0115359.

⁷² See *supra* § II.C.

⁷³ See Nakamura Opp'n at 15 (quoting *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) and *Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-CV-1392 JLS (NLS), 2011 WL 5025152, at *5 (S.D. Cal. Oct. 21, 2011) for the proposition that Plaintiffs' class should be defined to include only harmed class members); Giarratano Opp'n at 12 (arguing, without citation to any authority, that "plaintiffs' definition fails to distinguish between players who were actually subjected to and harmed by Defendants' wrongful conduct . . . and those who were not").

⁷⁴ Giarratano Opp'n at 11-12.

⁷⁵ See *Wallenstein v. Mondelez Int'l, Inc.*, No. 22-cv-06033-VC, 2024 WL 4293904, at *2 (N.D. Cal. Sept. 25, 2024) ("[W]hile the defendants invoke concerns about 'ascertainability,' this requirement does not exist in the Ninth Circuit.") (citing *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121, 1124 (9th Cir. 2017)).

1 identifying—by name—304 class members in his Supplemental Initial Disclosures.⁷⁶

2 *Second*, Defendants argue that an issues class cannot be certified because the statute of
3 limitations for *some* class members may have run on a *subset* of claims.⁷⁷ Again: this fundamentally
4 misunderstands the way Rule 23(c)(4) will streamline this litigation. Plaintiffs never argued that
5 any class member with time-barred claims would be permitted to re-assert those claims by virtue
6 of being a class member. To the contrary: Plaintiffs made clear that Defendants will assert any
7 individualized defenses against class members following determination of the common issues. *See*
8 Mot. at 25 (arguing that if there is a finding of liability on common issues, then the case would
9 “proceed to entertain [defendant’s] affirmative defenses and cull the class accordingly”) (quoting
10 *Avilez*, 596 F. App’x at 580).

11 To the extent the Court desires to make this even clearer now, it could readily do so through
12 use of two sub-classes: with John Does 1-3 to represent a subclass of “All members of the
13 University of San Francisco baseball team since March 11, 2020,” who have live discrimination
14 and retaliation claims against USF, and live negligence claims against USF and the Coach
15 Defendants; and John Does 4-14 to represent a subclass of “All members of the University of San
16 Francisco baseball team between March 10, 2020 and 2000” who have live discrimination claims
17 against USF. *See* ECF No. 128 at 18-21 (holding that tolling for the discrimination claims is “better
18 addressed at summary judgment” but otherwise declining to toll the statute of limitations for Does
19 4-14). Critically, however, the issues for which Plaintiffs seek Rule 23(c)(4) certification will rise
20 or fall on the same common evidence for both classes. As particularly relevant here, this will
21 include common evidence that the Coach Defendants’ misconduct was known to USF and covered-
22 up for *decades*.⁷⁸ As detailed above, in recent weeks USF has produced more of precisely such
23 evidence. In his arbitration testimony, USF President Fr. Fitzgerald noted that “[REDACTED]

24 ⁷⁶ MvK Decl. ¶ 15.

25 ⁷⁷ USF Opp’n at 12; Nakamura Opp’n at 13-14; Giarratano Opp’n at 12-13.

26 ⁷⁸ *See Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 690, 705 (6th Cir. 2022) (holding at the motion
27 to dismiss phase that plaintiffs’ Title IX claims were not time-barred where Ohio State “actively
28 misled students by, for example, telling complainants that no one had ever previously complained
about [their abuser],” such that plaintiffs could not reasonably have known they were injured by
the university until public reporting on the issue in 2018). Indeed, in the face of evidence that
complaints were made against the Coach Defendants as early as 2000, USF is *still* (and falsely)
telling Plaintiffs that no one complained until 2021. USF Opp’n at 18.

1 [REDACTED]
 2 [REDACTED]⁷⁹ USF's Human Resources Director Nelson similarly
 3 testified to "[REDACTED]" of the abuse.⁸⁰

4 **B. The Class Satisfies All Four Requirements of Rule 23(a).**

5 **1. The Class Is Sufficiently Numerous.**

6 Only Nakamura challenges numerosity. This is telling, as the requirement is readily satisfied
 7 here. Nakamura's sole argument is that Plaintiffs did not sufficiently document the class size in the
 8 declaration Plaintiffs submitted on this point.⁸¹ For the avoidance of doubt: USF's 2020 baseball
 9 roster contained 36 players; its 2021 roster 45 players, and its 2022 roster 47 players. Across these
 10 three seasons alone, the rosters included 82 unique players.⁸² The class size of course grows as you
 11 extend farther back into the class period. Plaintiffs therefore satisfy the numerosity requirement.
 12 *See Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) ("In general, courts find the
 13 numerosity requirement satisfied when a class includes at least 40 members."). That would remain
 14 true even if the Court continued looking only at the 2020-2022 players and all six of Defendants'
 15 declarants who appeared on the 2020-2022 rosters ultimately opted out of the class. *Id.*

16 **2. There Is at Least One Common Question with a Common Answer that**
 17 **Will Drive the Litigation.**

18 Defendants do not dispute that the *seventeen* questions Plaintiffs identified are common, or
 19 that "determination of [their] truth or falsity will resolve an issue that is central to the validity of
 20 each one of the claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). *See also* Mot.
 21 at 16-17, 19, 21 (listing common questions). Instead, Defendants focus their arguments on the
 22 commonality of questions not raised and, because this motion is brought under Ruler 23(c)(4), not
 23 at issue in (or in any way relevant to) this motion.

24 Defendants' commonality argument amounts to this: "There is zero evidence that players
 25 were injured on a class-wide basis." USF Opp'n at 14. The sum total of Defendants' evidence? The

26 ⁷⁹ Selbin Decl., Ex. 16 (Fitzgerald Dep. Tr.) at 33:5-11; *id.* at 68:8-10 ("[REDACTED]").
 27 [REDACTED]

28 ⁸⁰ *Id.*, Ex. 4 (Nelson Dep. Tr.) at 48:20-23.

⁸¹ Nakamura Opp'n at 15.

⁸² Selbin Decl., Ex. 17 (USF_0000804), Ex. 18 (USF_0000427), Ex. 19 (USF_0000808).

“declarations” submitted by class members, disavowing any harm from the Coach Defendants’ sexual misconduct. Even if these declarations are credited—and as discussed above, there is good reason to question them—they cannot defeat commonality because they do not concern the common questions *actually at issue here*. For example, USF notes the “omission” of the following question from Plaintiffs’ motion as “critical”: “Was each member injured?”⁸³ But this question is neither omitted nor critical. Again: Plaintiffs *do not* seek certification of damages issues.⁸⁴ For example, to the extent the factfinder determines (in addition to answering other common questions) that “abuse by the Coaches was foreseeable to USF, or abuse by Nakamura foreseeable to Giarratano,”⁸⁵ then each class member would be required to individually step forward and certify that they (like Plaintiffs) were harmed by the Coaches’ misconduct.⁸⁶

As for the issues Plaintiffs *do* identify, they cited legal authorities supporting the commonality of each question.⁸⁷ Defendants either ignored or misrepresented these authorities, while also misrepresenting the record. There is no doubt that here, Plaintiffs raise more than the requisite one question. *See Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (noting that not “every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is ‘a single *significant* question of law or fact.’”) (emphasis in original) (cleaned up).

a. USF Does Not Rebut Commonality on the Discrimination Claims.

USF’s attack on the common questions for Plaintiffs’ discrimination claims amounts to misstatements regarding both anti-discrimination law and the factual record.⁸⁸ Both attempts fail.

On the law, USF asserts: “Plaintiffs do not identify, nor has USF located, any case where a court granted a contested motion for class certification on these types of Title IX claims.”⁸⁹ This is

⁸³ USF Opp’n at 18.

⁸⁴ This case is therefore unlike those cited by USF involving class member declarations—none of which were brought under Rule 23(c)(4), and in all of which the declarations undercut the commonality of the common questions actually raised. *See* USF Opp’n at 14 (citing *Garcia v. Sun Pac. Farming Coop.*, No. CV F 06-0871 LJO TAG, 2008 WL 2073979 (E.D. Cal. May 14, 2008) and *Gonzalez v. Millard Mall Servs., Inc.*, 281 F.R.D. 455 (S.D. Cal. 2012)).

⁸⁵ Mot. at 21.

⁸⁶ Given that Plaintiffs do, in fact, include foreseeability as a common question, USF’s inclusion of this question as an “omission” is puzzling. USF Opp’n at 18.

⁸⁷ Mot. at 16-21.

⁸⁸ *See id.* at 16-17, 19 (listing questions).

⁸⁹ USF Opp’n at 15.

1 false. These claims are discrimination claims—in the main, Plaintiffs allege and will prove they
 2 were denied equal access to educational opportunities because they are men.⁹⁰ Plaintiffs cited cases
 3 where such claims were certified on contested motions. *See* Mot. at 18-19 (citing *Ollier*, 768 F.3d
 4 at 867 and *A. B. v. Haw. State Dep’t of Educ.*, 30 F.4th 828, 834, 840 841 (9th Cir. 2022)). Others
 5 exist.⁹¹ To the extent USF faults Plaintiffs for not citing examples of contested (and decided)
 6 certifications specifically on a pre-assault theory, then USF ignores the fact that this is “[a] new
 7 theory of institutional liability from the Ninth Circuit [that] poses a new avenue for plaintiffs suing
 8 universities under Title IX.” Delaney R. Davis, *Title IX at Fifty: Reimagining Institutional Liability*
 9 *Under Karasek’s Pre-Assault Theory*, 58 Ga. L. Rev. 313, 313 (2023).

10 USF attacks other of Plaintiffs’ authorities as settlement rather than litigation
 11 certifications.⁹² But Plaintiffs already noted in their motion that “[t]hough *Rapuno* was certified
 12 in the settlement context, the court made clear that its analysis was no less rigorous than if it had
 13 been analyzing the class for litigation.”⁹³ And indeed, the *Rapuno* court noted that settlement
 14 certification “demands a searching—not a relaxed—inquiry,” which may differ as between
 15 settlement and litigation, but is not less rigorous in the former context. *Rapuno v. Trs. of*
 16 *Dartmouth Coll.*, 334 F.R.D. 637, 643-44 (D.N.H. 2020). Notably, the portion of *Rapuno* in which
 17 USF claimed the court was “easing normal certification requirements” concerned Rule 23(b)(3)
 18 predominance, which is not at issue here. *Id.* at 651. USF dismisses the remainder of Plaintiffs’
 19 authorities as being “individual cases, not class actions.” USF Opp’n at 15. What this ignores is
 20 how frankly remarkable it is that *thirteen people* came forward, notwithstanding the pressure to
 21 conform and the risk of retaliation, to affirm the need for a class action here.⁹⁴ And in any event, it
 22 is axiomatic that individual cases are instructive in determining the elements of the underlying
 23 claim, which necessarily informs which questions are (or are not) common for that claim.

24 ⁹⁰ *See, e.g.*, ECF No. 133 (TAC) ¶¶ 532-51, 582-88.

25 ⁹¹ *See, e.g.*, *Anders v. Cal. State Univ., Fresno*, No. 121CV00179AWIBAM, 2022 WL 3371600,
 at *8 (E.D. Cal. Aug. 16, 2022) (commonality met on a contested motion for class certification of
 26 a Title IX claim); *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 935 (D. Minn. 2018) (same).

27 ⁹² USF Opp’n at 15.

⁹³ Mot. at 17 n.24.

28 ⁹⁴ *See* Selbin Decl., Ex. 20 (Suppl. Boland Rep.) at ¶¶ 25-26. Indeed, the retaliation continues in
 these papers. The personal attacks on the Does contained in Defendants’ oppositions confirm the
 continued need for anonymous pleading here.

To support its (false) claim that discrimination class actions never happen, USF cites three opinions.⁹⁵ One plainly does not stand for that proposition, as it is not a class case at all, predates the last quarter-century of development in Title IX law, and ultimately upholds the claim. *See Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 654 (1999) (reversing dismissal of individual Title IX claim). The second is a nearly equally stale case out of the District of Kansas, in which the court declined to certify a class where two high school students alleged they were harassed by a male peer at “a private, back-to-school party off school grounds.” *Doe v. Unified Sch. Dist.* 259, 240 F.R.D. 673, 674 (D. Kan. 2007). That is a remarkably different set of circumstances than here: the Coach Defendants abused Plaintiffs and other class members on USF grounds, on a daily basis, for two decades, all while USF not only ignored reports of this abuse but took steps to cover it up.⁹⁶ The third is a Title VII case, in which the plaintiffs brought an injunctive-relief only class to challenge their employer’s policies and practices as discriminatory, but failed to establish that they—or *anyone else*—had actually suffered discrimination. *See Brown v. Bd. of Trs. of Univ. of Ill.*, No. 19-cv-02020, 2022 WL 17547575, at *4 (C.D. Ill. Dec. 9, 2022) (“[E]ven if Plaintiffs are correct in their assertion the NDP and its complaint procedure are problematic, such a finding has no bearing on whether *anyone* suffered a Title VII violation. Plaintiffs have put the cart before the horse.”) (emphasis in original). Not so here: each Plaintiff has detailed his own abuse, and only class members who likewise come forward to demonstrate their harm would be entitled to damages (following a liability finding on the common issues). And Plaintiffs no longer seek injunctive relief, though one hopes USF would seriously consider it, in light of its own recognition regarding the inadequacy of its existing policies and practices.⁹⁷

On the facts, USF first argues that “[w]hile Plaintiffs toss around words like ‘deliberate indifference,’ the truth is that after years of discovery in this case, Plaintiffs remain unable to show

⁹⁵ USF Opp’n at 16-17. In a footnote, USF also cites a series of excessive force cases under 42 U.S.C. § 1983 that plainly have no application here. *See* USF Opp’n at 17, n.9 (citing *Black Lives Matter L.A. v. City of L.A.*, 113 F.4th 1249 (9th Cir. 2024); *NAACP of San Jose/Silicon Valley v. City of San Jose*, No. 21-CV-01705-PJH, 2023 WL 2823506 (N.D. Cal. Apr. 7, 2023); *Garza v. City of Sacramento*, No. 20-cv-01229 WBS JDP, 2022 WL 2757600 (E.D. Cal. July 14, 2022)).

⁹⁶ *See* Mot. at 2-13; *supra* § II.

⁹⁷ *See supra* § II.A (detailing the findings of the USF-commissioned investigative report).

1 that any player made a report of sexual harassment to the university before 2021.”⁹⁸ False. In fact,
 2 Plaintiffs’ motion detailed complaints to USF throughout the class period, beginning in 2000 with
 3 a complaint made directly to then-AD Bill Hogan about the Coaches’ abuse.⁹⁹ In discovery
 4 produced since, Plaintiffs uncovered even more examples, as well as admissions by USF that it was
 5 *long-aware* of a culture of abuse on the baseball program.¹⁰⁰ And to be clear: deliberate indifference
 6 is not a buzzword Plaintiffs invented to “toss around.” It is a tenet of federal and state
 7 antidiscrimination law.¹⁰¹ USF’s characterization of it as just a buzzword reflects the same cavalier
 8 attitude toward its responsibility to students that resulted in this lawsuit.

9 USF next argues that the “report from Plaintiffs’ expert, Robert Boland is a red herring,”
 10 because Boland “only review[ed] a select set of USF policies.”¹⁰² Also false. As noted in his
 11 materials considered—which USF calls “inflated” at the same time it suggests it is inadequate—
 12 Boland considered *every single* policy, presentation, or training USF had by-then produced in the
 13 litigation.¹⁰³ Indeed, Plaintiffs’ counsel repeatedly requested that USF complete its policy
 14 productions in advance of class certification, so that Boland would have a complete record. USF
 15 refused.¹⁰⁴ Plaintiffs also served several interrogatories asking USF to identify all responsive
 16 policies and trainings, so Plaintiffs could themselves identify any holes. Boland considered *every*
 17 *policy and training USF identified*, though USF inexplicably refused to provide an “exhaustive
 18 list.”¹⁰⁵ Plaintiffs went as far as to do homework for USF, identifying a spreadsheet that appeared

19 ⁹⁸ USF Opp’n at 18.

20 ⁹⁹ Mot. at 11-13.

21 ¹⁰⁰ See *supra* § II (detailing this still incoming discovery).

22 ¹⁰¹ See Mot. at 16-17 (detailing elements of Plaintiffs’ deliberate indifference theories).

23 ¹⁰² USF Opp’n at 20. Bizarrely, USF also faults Boland for not opining on whether USF’s policy
 24 failures caused harm to any one class member. USF Opp’n at 21-22. But Plaintiffs do not offer *now*
 25 an expert on such harm, for the simple reason that such expertise is not at issue in this motion.
 26 Again: should the factfinder reach liability findings on the common issues, only then would each
 27 class member come forward to prove harm. As for the Plaintiffs, USF is well aware that they each
 28 retained an expert (Anthony Charuvastra, MD) to opine on the causes and extent of their harms.
 Indeed, USF long ago received Dr. Charuvastra’s expert analysis of each Plaintiff, MvK Decl. ¶
 16, so USF’s choice to fault Boland for not offering similar opinions now is puzzling. Dr.
 Charuvastra’s reports are not discussed here because they are not relevant here.

¹⁰³ See Mot. at 5, n.7 (“Boland reviewed every policy and training document produced by USF
 through November 15, 2024.”).

¹⁰⁴ ECF No. 236 at 4.

¹⁰⁵ MvK Decl. ¶¶ 17-18.

1 to include all responsive documents in this category throughout the class period, and asking USF
 2 to “confirm that spreadsheet reflects the universe of responsive policies, practices, and trainings.”¹⁰⁶
 3 Again USF refused, and explained that it was “not able to state definitively at this point” when its
 4 policy production would be complete.¹⁰⁷ To the extent Boland did not review a policy or training,
 5 it is solely because USF did not timely produce it.

6 More importantly, despite suggesting that Boland’s policy review was incomplete, USF
 7 does not identify a single document—policy or training—that it believes Boland should have but
 8 did not review. Similarly, though USF claims that its “policies and the standard of care have
 9 changed over time, providing no uniform answer across the class,”¹⁰⁸ USF fails to identify a *single*
 10 *example* of such a policy change. And perhaps most critically, USF does not (and cannot) challenge
 11 Boland’s conclusion that at *no point in the class period* did USF have policies: “(1) prohibiting
 12 sexual communication or sexual conduct between coaches and student-athletes, (2) mandating
 13 training related to the power dynamic between coaches and student-athletes and to the inability of
 14 student-athletes to consent to any form of sexual communication or sexual conduct with their
 15 coaches, or (3) requiring appropriate team environments free from any form of sexual
 16 communication or sexual conduct between coaches and student-athletes.”¹⁰⁹ Nor does USF
 17 challenge Boland’s conclusion that “[t]hese policy failures place USF far below minimal acceptable
 18 standards for college sexual misconduct policies.”¹¹⁰

19 **b. USF Does Not Rebut Commonality on the Retaliation Claim.**

20 USF’s sole response to the common questions Plaintiffs raised on their retaliation claim is
 21 that Plaintiffs’ case is not similar enough to another recently certified Title IX retaliation case.¹¹¹
 22 In so arguing, USF misrepresents that opinion.

23
 24 ¹⁰⁶ ECF No. 236-1 at 9.

25 ¹⁰⁷ *Id.* at 7.

26 ¹⁰⁸ USF Opp’n at 9.

27 ¹⁰⁹ Mot. at 5 (citing Boland Rep.).

28 ¹¹⁰ *Id.* Despite not meaningfully challenging Boland’s opinions, USF invites the Court to exclude them. USF Opp’n at 22. This is improper. To the extent USF seeks to include Boland’s opinion, it must bring a motion under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

¹¹¹ USF Opp’n at 22-23.

1 In *A. B. v. Hawaii State Department of Education*, the Ninth Circuit reversed an order
 2 denying certification, rejecting the very same argument USF makes again here: that the retaliation
 3 was “unique to the named Plaintiffs.” 30 F.4th 828, 834 (9th Cir. 2022) (cleaned up). The Court
 4 held that where, as here, the “retaliation had a deterrent effect on female students more generally[,] . . .
 5 . . . that many of the class members were not the direct targets of the alleged retaliation would not
 6 necessarily be a bar to classwide relief.” *Id.* at 841. As in *A. B.*, the Coaches’ years-long and
 7 retaliatory practice of (among other retaliation) running players who refused their sexual conduct
 8 off the team had the “effect of broadly dissuading [players] from ‘raising the issue of sex
 9 discrimination’ out of fear that the [Coaches] would likewise retaliate against them.” *Id.* at 840.

10 These holdings were detailed in Plaintiffs’ motion, yet USF fails to engage them. Instead,
 11 USF falsely asserts that the opinion requires plaintiffs to “point to [a] specific retaliatory action.”¹¹²
 12 As set forth above and in Plaintiffs’ motion, it plainly does not. USF has simply provided no basis
 13 to conclude that the two questions Plaintiffs identified for their retaliation claim are anything but
 14 common. *See* Mot. at 19 (identifying questions).

15 **c. Defendants Do Not Rebut Commonality on the Negligence Claims.**

16 Again, USF’s sole response to the common questions Plaintiffs raised on their negligence
 17 claims is that Plaintiffs’ case is not similar enough to another case where a court in this District
 18 recently certified negligence claims.¹¹³ Here, too, USF’s argument fails.

19 In *Hilario v. Allstate Insurance Co.*, the Court certified the negligence claims of a group of
 20 California homeowners’ insurance policyholders challenging Allstate’s double counting of built-in
 21 garage space in calculating the square footage of their homes. 642 F. Supp. 3d 1048, 1054 (N.D.
 22 Cal. 2022), *aff’d*, No. 23-15264, 2024 WL 615567 (9th Cir. Feb. 14, 2024). The Court affirmed
 23 that whether Allstate’s alleged failures to catch, communicate, and correct this double-counting
 24 presented “common questions of law and fact ‘capable of class-wide resolution.’” *Id.* at 1060
 25 (citation omitted). In so holding, the Court rejected Allstate’s attacks that, like USF’s attacks here,
 26 focused on purportedly individualized questions of proof. *See id.* at 1061 (rejecting “Allstate’s
 27

28 ¹¹² USF Opp’n at 22.

¹¹³ *Id.* at 23.

argument against commonality . . . that ‘determin[ing] liability under Plaintiff’s theory . . . would necessitate individual adjudication of the true size of each home, as well as [other unique considerations]’). There, as here, “the ‘common answers’ about whether Allstate implemented [a] policy, and breached any duty . . . will ‘drive the resolution of litigation.’” *Id.* (citation omitted). So again, USF has provided no basis to conclude that the seven questions Plaintiffs identified for their negligence claims are anything but common. *See Mot.* at 21 (identifying questions).

The Coach Defendant’s commonality arguments fare no better. They simply repeat the misguided attack that Plaintiffs’ motion fails because it is too targeted—i.e., focused on only the common issues, and not the issues Plaintiffs agree are individual and will necessitate individualized evidence (i.e., whether USF’s and the Coach Defendants’ actions and inactions caused them harm, and if so, the extent of that harm).¹¹⁴ Like USF, they rely near exclusively on the declarations submitted in opposition to class certification.¹¹⁵ Again, even if there were not good cause to question those declarations, they have zero bearing on the common issues actually identified by Plaintiffs for classwide resolution. And contrary to their suggestions, none of the authorities cited by the Coach Defendants actually stands for the proposition that no common questions can exist where the class representatives’ and class members’ experiences differ.¹¹⁶

¹¹⁴ Nakamura and Giarratano argue that Plaintiffs’ common questions are insufficient because they would not *entirely* resolve all elements of Plaintiffs’ negligence claims—duty, breach, causation, and damages. Nakamura Opp’n at 17-18; Giarratano Opp’n at 15. This is just a failure to engage the motion Plaintiffs actually brought. Plaintiffs do not dispute that there must be individual trials to determine whether and to what extent each class member was harmed. *Mot.* at 24-25. But that is not a flaw in Plaintiffs’ motion—it is an appropriate application of Rule 23(c)(4). *See also infra* § III.C.2 (responding to Defendants’ argument that Rule 23(c)(4) is unavailable unless a plaintiff seeks issue certification on *all* potential liability issues).

¹¹⁵ Nakamura Opp’n at 17; Giarratano at 17-21.

¹¹⁶ Nakamura Opp’n at 16. *See Willis v. City of Seattle*, 943 F.3d 882, 887 (9th Cir. 2019) (affirming denial of Rule 23(b)(2)—not (c)(4)—certification, in case brought by unhoused individuals challenging the city’s practice of destroying property during “sweeps” of encampments, because even as framed most favorably for appellants, their “arguments primarily focus on how the [city’s] Guidelines give employees too much discretion,” which the Supreme Court has held is precisely the sort of question that cannot be common) (citing *Wal-Mart*, 564 U.S. at 355); *Howard v. Cook Cnty. Sheriff’s Off.*, 989 F.3d 587, 603-04 (7th Cir. 2021) (commonality lacking because plaintiffs had not demonstrated that ambient harassment “manifests in the same way across all parts of the jail,” where the jail filled 36 buildings that spanned eight city blocks and had a rotating population basis of 6,500 inmates); *Van v. Ford Motor Co.*, 332 F.R.D. 249, 260-62, 277-78 (N.D. Ill 2019) (commonality lacking where the misconduct occurred in two large Ford Motor Company facilities—akin to “mini-cit[ies]”); *Hanni v. Am. Airlines, Inc.*, No. C 08-00732 CW, 2010 WL 289297, at *1 (N.D. Cal. Jan. 15, 2010) (commonality lacking for 13,000 passengers whose numerous different flights were delayed for varying amounts of time).

d. Plaintiffs' Common Evidence Is Admissible.

Nakamura argues that Doe 1 and 2's deposition testimony from the NCAA matter (Plaintiffs' opening Exhibits 3 and 4), along with Plaintiffs' opening Exhibits 13, 14, 15, and 19 are unauthenticated and inadmissible.¹¹⁷ But the Ninth Circuit has expressly rejected the argument that evidence offered in support of class certification need be admissible. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018) ("[T]he 'evidentiary proof' a plaintiff must submit in support of class certification . . . need not be admissible evidence.").

Nakamura's argument also fails on its merits. All of the Exhibits are authentic because USF produced them in discovery.¹¹⁸ Exhibits 13 and 15 are emails reflecting USF Human Resources Director Diane Nelson's "summary of findings" from her investigation into Giarratano and Nakamura's misconduct. Exhibit 14 are her notes from calls with Giarratano and Nakamura. These documents are straightforward party admissions under Rule 801(d)(2).¹¹⁹ Exhibit 19 is a complaint by Doe 8's father to USF about the Coaches. It is offered for a non-hearsay purpose: notice. *See* Mot. at 11 (exhibit offered to show USF's awareness of misconduct).¹²⁰

As to the testimony from the NCAA matter, it is admissible under both Federal Rule of Civil Procedure 32(a)(8) and Federal Rule of Evidence 804(b). *See* Moore's Federal Practice - Civil § 32.63 (explaining that Rule 32(a)(8) and Rule 804(b) provide independent bases for admission of prior testimony). Rule 32(a)(8) permits the admission of deposition testimony from another matter with (1) "a substantial identity of issues," and (2) "the presence of an adversary with the same motive to cross-examine the deponent." *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 (9th Cir. 1982). "[T]he two lawsuits need not involve identical issues and parties." *Id.* Rule 804(b) permits

¹¹⁷ Nakamura Opp'n at 9.

¹¹⁸ *See, e.g., Siebert v. Gene Sec. Network, Inc.*, 75 F. Supp. 3d 1108, 1115 (N.D. Cal. 2014) (act of producing document in discovery authenticates it). And none is hearsay.

¹¹⁹ *See, e.g., Ortega v. Neil Jones Food Co.*, No. 12-CV-05504-LHK, 2014 WL 232358, at *5 (N.D. Cal. Jan. 21, 2014) (statements made to party's HR employees admissible as party admissions when offered against party). Moreover, the documents have other "circumstantial guarantees of trustworthiness"—none of the Defendants had any incentive to substantiate the Does' allegations of misconduct, but that's exactly what USF found and what the Coaches admitted to. *See Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1046 (9th Cir. 1999) (finding employees statements within insurance investigator's report admissible as party admission).

¹²⁰ *See Pinterest, Inc. v. Pintrips, Inc.*, No. 13-cv-04608-HSG, 2015 U.S. Dist. LEXIS 76545, at *3 (N.D. Cal. June 12, 2015) (holding "both exhibits may be admitted for the non-hearsay purpose of demonstrating Pintrips' knowledge and intent").

admission where a “predecessor in interest . . . had an opportunity and similar motive to develop the testimony by cross examination.” *Brighton Collectibles, Inc. v. Coldwater Creek Inc.*, No. 06-CV-01848-H (POR), 2009 WL 10671818, at *8 (S.D. Cal. Apr. 22, 2009). The objecting party bears the burden of explaining “precisely why [the] motive and opportunity of defendants in the first case were not adequate to develop cross-examination that the instant defendant would have presented to the witness.” *Id.* (quoting Rutter Group, *Fed. Civil Trials & Evidence*, 8:3062).

Here, the NCAA matter and this case unquestionably share a “substantial identity of issues”—the cases were originally one action¹²¹ and the exact same conduct is at issue in both. Defendants themselves have referred to the NCAA as a related case. *See* ECF No. 228 at 32 (“[T]his action and the NCAA action are nearly identical.”). Similarly, the NCAA took the depositions in question and had a similar motive as Nakamura to develop the testimony: minimizing or disproving the Does’ allegations of misconduct. Nakamura makes no contrary argument despite bearing the burden to do so. And Nakamura *himself* had an opportunity to participate in the depositions in question—Plaintiffs noticed the depositions for both this and the NCAA action.¹²² Nakamura refused and should not now be heard to complain that he was not present.

Finally, it is worth noting that Nakamura does not suggest that the testimony in question is inconsistent with what Does 1 and 2 offered in this case (which occurred after Plaintiffs filed their motion). Nor does he argue that Does 1 and 2 could not have made identical points in sworn declarations (just as he did in opposition). And in fact, both Does did. *See* Doe 1 Decl. ¶ 21; Doe 2 Decl. ¶ 22 (adopting their NCAA deposition testimony as a more fulsome account of the misconduct they experienced).

3. Plaintiffs’ Claims Are Typical of the Class.

Defendants do not dispute that courts find typicality satisfied in cases like this one. *See* Mot. at 21-22 (citing typicality findings in similar contexts). Instead, their arguments are predicated upon perceived differences in the extent of harm experienced by Plaintiffs and other class members.¹²³ Here, again, Defendants misunderstand the necessary inquiry.

¹²¹ But for lack of personal jurisdiction, they still would be.

¹²² MvK Decl. ¶ 20.

¹²³ USF Opp’n at 24-26; Nakamura Opp’n at 18-19.

1 The typicality requirement is met when the class representative's claims rest on the same
 2 *legal theory* as absent class members, and the existence of *different factual circumstances* in
 3 proving (or disproving) that theory does not defeat typicality. *See* Mot. at 21 (citing *Ellis v. Costco*
 4 *Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011); *Wolin v. Jaguar Land Rover N. Am., LLC*,
 5 617 F.3d 1168, 1175 (9th Cir. 2010)).¹²⁴ Where, as here, a class representative seeks only to certify
 6 certain issues under (c)(4)—and not entire claims—the inquiry is necessarily limited to typicality
 7 as to those issues. Here, Defendants do not even bother to argue that the either the legal theories or
 8 evidence underpinning these common issues will differ in any way across the class. Instead, as
 9 throughout their opposition, they attempt to direct the Court's attention to irrelevant distinctions
 10 between class members' *harms* as purportedly reflected in the "declarations" obtained from absent
 11 class members.¹²⁵ As discussed extensively, these declarations do not defeat certification.

12 Defendants also argue that the named Plaintiffs are subject to unique defenses, such as
 13 "defenses to players whose parents paid their tuition, or covered other expenses related their
 14 departure from USF."¹²⁶ Even assuming Defendants can identify individual defenses—and to be
 15 clear, your parents paying your tuition is a defense to neither discrimination nor negligence—
 16 Defendants will have an opportunity to present those defenses. So even assuming such defenses
 17 exist, they would not defeat typicality.

18 **4. Plaintiffs and Counsel Adequately Represent the Class.**

19 The Court instructed the parties to "bring down the temperature."¹²⁷ In its opposition, USF
 20 did the opposite—repeatedly (and falsely) calling Does 1-3 money-grubbing liars.¹²⁸ USF (and only
 21 USF) went a step further, attacking proposed class counsel's adequacy and levying serious
 22 accusations regarding counsel's representation of Plaintiffs in this action.¹²⁹ While, to their credit,

23 ¹²⁴ USF is the only Defendant to substantively cite any authority in its attempt to undercut typicality.
 24 USF Opp'n at 24. But it is the same case—*Doe v. Unified Sch. Dist. 259*—that USF relied upon for
 25 commonality, and remains unpersuasive for the reasons detailed above. *See supra* § III.B.2.a.

26 ¹²⁵ USF also argues in opposing typicality that "Plaintiffs cannot even keep their own clients from
 27 recanting." USF Opp'n at 25. As discussed below, Doe 7's declaration cannot be credited and
 28 USF's conduct in eliciting it raises serious ethical concerns. *See infra* at 29.

¹²⁶ USF Opp'n at 27. *See also* Nakamura Opp'n at 19; Giarratano Opp'n at 16-17.

¹²⁷ ECF No. 235 at 2.

¹²⁸ USF Opp'n at 9-10.

¹²⁹ *Id.* at 28.

1 Nakamura's and Giarratano's adequacy arguments are not *ad hominem*, they are no more
2 compelling. None of the arguments undercut the adequacy of either Plaintiffs or their counsel.

3 As to Plaintiffs, USF first argues that a conflict exists because Does 1-3 (and class members
4 who played since March 11, 2020) have claims the Court found untimely for Does 4-14 (and class
5 members who played between March 10, 2020 and 2000). USF cites *zero* authority that this
6 presents a conflict defeating adequacy.¹³⁰ But if the Court prefers to divide the class, doing so would
7 entirely resolve the issue: with Does 1-3 to represent a subclass of "All members of the University
8 of San Francisco baseball team since March 11, 2020," who have live discrimination and retaliation
9 claims against USF, and live negligence claims against USF and the Coach Defendants; and Does
10 4-14 to represent a subclass of "All members of the University of San Francisco baseball team
11 between March 10, 2020 and 2000" who have live discrimination claims against USF.

12 USF and Giarratano further argue that Plaintiffs are not adequate because some absent class
13 members claim—through the declarations—that they disagree with the lawsuit and support the
14 Coach Defendants.¹³¹ This fundamentally misunderstands the role of a class representative. In this
15 case, as in all class actions, there may be individuals who do not want to be included in the class.
16 This is not fatal to class certification, it is the very reason a notice and opportunity to opt-out are
17 built into Rule 23. *If* an issue class is certified, all absent class members—including all of the
18 declarants—will have an opportunity to remove themselves from the case.

19 Finally, Nakamura argues that Plaintiffs are not adequate because they may be subject to
20 "unique defenses" that "will necessarily involve individualized" fact-finding.¹³² Nakamura fails
21 again here to actually identify any such defenses. In any event, Plaintiffs' motion contemplates a
22 second, individual phase of trial—at which point Plaintiffs would no longer represent the class, but
23 themselves—where any individual defenses or fact-finding would occur. This is precisely how Rule
24 23(c)(4) was designed to operate. *See Jimenez*, 765 F.3d at 1166-67 (adopting the prevailing view
25 that individualized "determination of damages" may follow classwide resolution of common issues,
26 even in the more demanding context of a Rule 23(b)(3) class). Nakamura's authorities on this point

27 ¹³⁰ USF Opp'n at 28.

28 ¹³¹ *Id.*; Giarratano Opp'n at 21.

¹³² Nakamura Opp'n at 20.

are therefore not instructive, as they concern different sections of Rule 23.¹³³

As to proposed class counsel, USF's attacks are based on demonstrable falsehoods in the Declaration of Doe 7.¹³⁴ By relying on these statements—some of which USF unquestionably knows to be false—USF placed Plaintiffs' counsel in the difficult position of having to demonstrate the untruthfulness of statements made by a former client under penalty of perjury. Plaintiffs' counsel do not take this lightly, and retained an expert in California legal ethics to advise on how to address this unfortunate situation in a manner that complies with their obligations to this former client under the California Rules of Professional Conduct.¹³⁵ Consistent with this expert's advice, Plaintiffs' counsel detail below the false statements in Doe 7's declaration concerning their representation, and the documentation that these statements are false.¹³⁶

Statement: "In March 2024, I relieved Lieff Cabraser Heimann & Bernstein, LLP and Fegan Scott LLC as my counsel in this litigation. . . . I requested that my former lawyers stop representing me because I did not believe that they adequately represented my interests." Doe Decl. ¶ 3, 18.

Facts: It is public record that Plaintiffs' counsel withdrew representation after exhaustive efforts to contact Doe 7 went unanswered. Only after being served with the Court's order granting withdrawal did Doe 7 respond. He cited personal reasons, not counsel's representation, to explain his absence. Fegan Decl. ¶¶ 16, 34-57.

Statement: "When the lawsuit was filed, I was shocked to learn that I was also suing USF and the NCAA. I never agreed to sue the NCAA or the University of San Francisco, because I do not think they have done anything wrong." Doe Decl. ¶ 3.

Facts: Doe 7 retained Plaintiffs' counsel specifically to sue USF. He received, *edited*, and approved multiple drafts of the complaints naming all Defendants and exhaustively detailing the Coaches' sexual misconduct. Fegan Decl. ¶¶ 19-33.

Statement: "During the time they represented me, I was very surprised by how uninterested my lawyers seemed in my personal experience. The only forms of communication with my former lawyers were group e-mails or Zooms with the other Plaintiffs. At no point during their representation of me did my former lawyers speak with me individually about my experiences on the USF baseball team." Doe Decl. ¶ 5.

¹³³ See *Tourgeman*, 2011 WL 5025152 (Rule 23(b)(3)); *Freeman v. Delta Airlines, Inc.*, No. 15-CV-160 (WOB-CJS), 2019 WL 2495471 (E.D. Ky. June 14, 2019) (same); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) (same).

¹³⁴ USF Opp'n at 28.

¹³⁵ Selbin Decl. ¶¶ 2-3.

¹³⁶ Falsehoods in Doe 7's declaration regarding the Coach Defendants' sexual misconduct are detailed above. See *infra* § II.C.

Facts: Plaintiffs' counsel was in regular, direct contact with Doe 7. Before going silent, he promptly responded, thanking counsel for their efforts. Fegan Decl. ¶¶ 19-33.

As set forth above, USF also elicited statements from Doe 7 that are adverse to his live claims in this case.¹³⁷ USF's conduct with respect to Doe 7—an adverse pro se party—implicates California Rule of Professional Conduct 4.3. Plaintiffs' counsel retained an ethics expert and served discovery on these topics.¹³⁸ That expert—Merri Baldwin—evaluated both Plaintiffs' counsel's conduct alleged in the Doe 7 declaration and USF's conduct in obtaining and submitting it. She concludes:

- a. Plaintiffs' Counsel complied with their ethical obligations and the standard of care in connection with its communications with Doe 7 about the complaint and in seeking approval of that complaint[.]
- b. Plaintiff's Counsel's Reply . . . complies with the ethical duties and standards that apply to Plaintiffs' Counsel as former counsel to Doe 7, including the duty of confidentiality and attorney-client privilege[.]
- c. Defense Counsel's conduct in obtaining and drafting the Doe 7 Decl. appears to violate ethical rules and standards that apply to attorney communications with an unrepresented adverse party, given the fact that Doe 7 remains a plaintiff in this matter, was apparently unrepresented with respect to that declaration, and disclosed otherwise privileged information to Defense Counsel that is potentially harmful to Doe 7's own interests. Additionally, . . . there is a concern about whether Defense Counsel violated the duty of candor to the Court.¹³⁹

With respect to USF's counsel's interactions with Doe 7, Baldwin concluded further:

I am not aware of any facts that suggest that Doe 7 was represented by independent counsel in connection with the Doe 7 Decl., or that he was advised to seek such consultation. Likewise I see no facts that suggest that Doe 7 was aware of the fact that he was disclosing privileged communications, or the potential risk to him of doing so. Assuming there are no facts to show such disclosures to or awareness by Doe 7, this situation demonstrates the significant risks that exist where counsel for an adverse party contacts an unrepresented party, and exemplifies exactly the reason CRPC 4.3 exists and the justification for the protections it imposes.¹⁴⁰

Once USF produces the discovery Plaintiffs sought on these issues, it may be appropriate to convene an evidentiary hearing. For now, suffice it to say: USF's attacks on Plaintiffs' counsels' adequacy—predicated entirely upon false statements—cannot be credited.

¹³⁷ See *supra* § II.C (detailing inconsistencies between the testimony USF elicited from Doe 7 at the arbitration hearing and then drafted for Doe 7 in the declaration).

¹³⁸ Selbin Decl. ¶¶ 2-3; MvK ¶ 19.

¹³⁹ Preliminary Expert Report of Merri Baldwin, ¶ 9.

¹⁴⁰ *Id.*, ¶ 25.

1 **C. The Class Is Appropriate for Issue Certification under Rule 23(c)(4).**

2 **1. Predominance Is Not at Issue.**

3 Defendants acknowledge that Plaintiffs need not satisfy Rule 23(b)(3)’s predominance
 4 requirement to certify a class under Rule 23(c)(4).¹⁴¹ Yet all three sidestep this admission,
 5 repeatedly arguing that Plaintiffs’ motion fails because “common issues do not predominate.” For
 6 example, USF argues that “prov[ing] individual harm” will “predominate over Plaintiffs’ proposed
 7 class issues,” and that Plaintiffs’ class issues are insufficient because “[t]hese questions fail to
 8 conclusively address injury.”¹⁴² It apparently bears repeating: Plaintiffs *do not seek certification of*
 9 *damages issues*. And they need not, to seek certification of *other issues* under Rule 23(c)(4). Indeed,
 10 the Ninth Circuit endorsed precisely this bifurcated approach in the more demanding Rule 23(b)(3)
 11 context. *Jimenez*, 765 F.3d at 1166-67. In a case cited by USF, the Seventh Circuit also recently
 12 rejected the very “all or nothing” approach to Rule 23(c)(4) that Defendants continue to advocate:
 13 “Agreeing with the . . . Ninth Circuit[], we hold that, as part of satisfying its burden under Rule 23,
 14 a party seeking certification of an issue class under Rule 23(c)(4) must show that common questions
 15 predominate in the *resolution of the specific issue* or issues that are the subject of the certification
 16 motion and *not as to the cause of action, taken as a whole.*” *Jacks v. DirectSat USA, LLC*, 118 F.4th
 17 888, 897 (7th Cir. 2024) (cleaned up, emphasis supplied).

18 As detailed in Plaintiffs’ motion and the newly obtained evidence cited here, common
 19 evidence will be used to establish liability on the common issues Plaintiffs identified.¹⁴³ None of
 20 this evidence turns on the lived experience of any one class member: it concerns USF’s and the
 21 Coach Defendants’ conduct—the systemic discrimination and/or negligence, over decades, that put
 22 class members at risk of the harms Plaintiffs attest to experiencing. This is precisely how Rule
 23 23(c)(4) operates. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)
 24 (“Even if the common questions do not predominate over the individual questions so that class
 25 certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate
 26 cases to isolate the common issues . . . and proceed with class treatment of these particular issues.”).

27 ¹⁴¹ USF Opp’n at 13; Nakamura Opp’n at 22; Giarratano Opp’n at 10.

28 ¹⁴² USF Opp’n at 10, 13.

¹⁴³ *See* Mot. at 16-19, *supra* § II.

1 **2. Determination of Common Issues Will Drive Resolution of this Action.**

2 Defendants argue that certification of an issues class is inappropriate here because Plaintiffs
 3 do not seek certification of every element of their negligence claim, and specifically, do not seek
 4 certification of causation and damages. *See* USF Opp’n at 29 (“Courts routinely deny requests to
 5 certify Rule 23(c)(4) classes in circumstances like this, where the determination of liability requires
 6 individualized assessment of injury and causation.”) (citing cases where courts denied Rule
 7 23(c)(4) certification of negligence claims); Nakamura Opp’n at 21-22 (same); Giarratano Opp’n
 8 at 14-15 (same).¹⁴⁴ This is not “routine,” Rule 23(c)(4) contains no such limitation, and the Ninth
 9 Circuit has never adopted one. This Court should not either.

10 Defendants’ primary authority is *Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686 (N.D. Cal.
 11 2019). There, a Facebook user brought a class action alleging the company’s inadequate security
 12 practices “allowed hackers to break into Facebook’s platform and pilfer the personal information
 13 of 29 million Facebook users worldwide.” *Id.* at 689-90. Unlike here, plaintiff sought certification
 14 of his negligence claim under Rules 23(b)(2), 23(b)(3), and 23(c)(4). *Id.* at 694. The Court spent
 15 the vast majority of its analysis on Rules 23(b)(2) and 23(b)(3)—spending only one paragraph (a
 16 total of 148 words) on Rule 23(c)(4)—and cited *zero* case law in its brief Rule 23(c)(4) analysis.
 17 *Id.* at 697. In addition to being an afterthought, the harm plaintiff sought to redress through Rule
 18 23(c)(4)—“individual damages resulting from the time spent devoted to the data breach”—is
 19 remarkably different from the harm Plaintiffs seek to redress here. *Id.* at 690, 694. It is not difficult
 20 to imagine why the Court was concerned that individualized trials regarding the “cause” of
 21 Facebook users’ wasted time was an inappropriate use of Rule 23(c)(4). This is particularly true as
 22 the Court had already concluded that the *plaintiff himself* had been unable to prove causation and
 23 damages for the harms he sought to redress under Rule 23(b)(3). *See id.* at 696 (holding that because
 24 plaintiff “has incurred zero out-of-pocket expenses as a result of this breach,” he “is not a member
 25 of the class he seeks to represent”); *id.* at 697 (holding that “loss of privacy and loss of royalties”
 26 was “too speculative to assert a claim for negligence”). Here, in contrast, Plaintiffs’ experiences
 27 reflect that the individual causation and harm inquiries will be far more connected and far more

28 ¹⁴⁴ USF therefore appears to have conceded that determination of the common issues on Plaintiffs’
 discrimination claims would materially advance resolution of those claims.

1 concrete, and will benefit from streamlined determinations on the issues of duty and breach.

2 Defendants' remaining authorities are no more compelling. In *Tasion*, plaintiffs attempted
 3 the opposite of what Defendants argue is inappropriate here: "basically asking the Court to have
 4 every element of a claim for fraudulent inducement and/or breach of express warranty subject to
 5 class treatment," including punitive damages, notwithstanding the fact that the Court had denied
 6 Rule 23(b)(3) certification for those same claims. *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*,
 7 308 F.R.D. 630, 639 (N.D. Cal. 2015). In other words, the *Tasion* plaintiffs were attempting to use
 8 Rule 23(c)(4) to erase (b)(3) predominance on every issue even *damages*. *Id.* Plaintiffs make no
 9 such attempt here. Rather, Plaintiffs acknowledge that causation and damages—which will be
 10 inextricably linked in a case of this nature—will necessitate individual inquiries. But first deciding
 11 the common issues of duty and breach using common evidence will "materially advance the
 12 litigation"—an end the *Tasion* Court acknowledges is worthy. *Id.* at 633. And in *Zinser*—cited by
 13 both Nakamura and Giarratano—the Ninth Circuit did not consider Rule 23(c)(4) at all, but
 14 affirmed denial under Rules (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3). *Zinser v. Accufix Rsch. Inst.,*
 15 *Inc.*, 253 F.3d 1180, 1184 (9th Cir. 2001), opinion amended on denial of reh'g, 273 F.3d 1266 (9th
 16 Cir. 2001). Notably, however, the dissent argued that the "manageability problems" identified by
 17 the Court could be resolved by Rule 23(c)(4). 253 F.3d at 1200-01. Amending that order following
 18 denial of rehearing en banc, the Court added only one line: "Of course, we do not suggest that the
 19 causation difficulties necessarily render class certification impossible." 273 F.3d at 1266.¹⁴⁵

20 ¹⁴⁵ Defendants' remaining authorities are either similarly unpersuasive or completely inapposite.
 21 See *ABC Distrib., Inc. v. Living Essentials LLC*, No. 15-cv-02064 NC, 2017 WL 2603311 (N.D.
 22 Cal. Apr. 7, 2017) (not a Rule 23(c)(4) case at all); *Moore v. Apple Inc.*, 309 F.R.D. 532 (N.D. Cal.
 23 2015) (same); *Bruce v. Teleflora, LLC*, No. 13-cv-03279-ODW(CWx), 2013 WL 6709939 (C.D.
 24 Cal. Dec. 18, 2013) (same); *Campion v. Old Republic Home Prot. Co.*, 272 F.R.D. 517 (S.D. Cal.
 25 2011) (same); *McGlenn v. Driveline Retail Merch., Inc.*, No. 18-cv-2097, 2021 WL 165121, at *11
 26 (C.D. Ill. Jan. 19, 2021) (out-of-Circuit and out-of-date case requiring issues sought to be certified
 27 to predominate over all issues in the case, in contravention of current Ninth and Seventh Circuit
 28 precedent); *Jones v. BRG Sports, Inc.*, No. 18 C 7250, 2019 WL 3554374, at *9 (N.D. Ill. Aug. 1,
 2019) (issue certification not appropriate because the issues sought to be certified "arise under
 eighteen different states' legal schemes"); *Hernandez v. Wells Fargo Bank, N.A.*, No. C 18-07354
 WHA, 2020 WL 469893, at *2 (N.D. Cal. Jan. 29, 2020) (issue certification not appropriate where
 multiple states' laws governed determination of what was "outrageous" for purposes of establishing
 intentional infliction of emotional distress claim); *Wollam v. Transamerica Life Ins. Co.*, No. 21-
 cv-09134-JST, 2024 WL 1117050, at *7 (N.D. Cal. Mar. 13, 2024) (rejecting plaintiff's request
 made "[i]n passing" for certification under Rule 23(c)(4) and conducting no analysis separate from
 its Rule 23(b) analysis); *Moeller v. Taco Bell Corp.*, No. C 02-5849 PJH, 2012 WL 3070863, at *4
 (N.D. Cal. July 26, 2012) (liability is truly individualized, unlike here, because case concerned

Defendants’ authorities therefore do not create the categorical “causation” bar Defendants ask the Court to apply to Rule 23(c)(4) here. Indeed, even the *Adkins* Court acknowledged that “[t]he text does not explain when such a [Rule 23(c)(4)] class would be appropriate.” 424 F. Supp. 3d at 697. And though the Ninth Circuit has not spoken on the issue, others have, and have explicitly endorsed issue certification where “individualized issues concerning fact-of-injury, proximate causation, and extent of damages can be resolved” following common determination of the certified issues. *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 410 (6th Cir. 2018). *See also id.* at 415 (“What is more, *Tyson* instructs that certification may remain ‘proper’ even if ‘important matters’ such as actual injury, causation, and damages will have to be tried separately.”) (citing *Tyson*, 577 U.S. at 452).

3. A Class Is Manageable and Superior to Multiple Individual Actions.

In determining whether an issues class is superior to individual actions, the question is: “Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?” *Butler v. Sears, Roebuck & Co.* (“*Butler I*”), 702 F.3d 359, 362 (7th Cir. 2012), cert. granted, judgment vacated, 569 U.S. 1015 (2013), judgment reinstated, *Butler II*, 727 F.3d 796. Here, the two-phased approach Plaintiffs advocate would unquestionably streamline the individualized damages inquiries that will occur—with or without class certification—after determination of common issues. Defendants’ counterarguments do not demonstrate otherwise.

USF argues that “judicial economy in the Northern District would be overwhelmed in attempting to adjudicate the remaining individual issues on the potential hundreds of trials.”¹⁴⁶ This misses the point that individual trials will occur *either way*, and it is far more efficient for those trial to begin (or not begin at all) because common issues of, for example, duty and breach individualized disability access); *McKinnon v. Dollar Thrifty Auto. Grp., Inc.*, No. CV 12–cv–04457–SC, 2015 WL 4537957, at *5 (N.D. Cal. July 27, 2015) (erroneously concluding that issue certification was inappropriate under Rule 23(c)(4) based on Rule 23(b) analysis); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 580 (C.D. Cal. 2014) (issue certification not appropriate where the law of twelve different states would apply); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (out-of-Circuit case requiring issues sought to be certified to predominate over all the issues, in contravention of Ninth Circuit authority); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 209 (D. Minn. 2003) (issue certification not appropriate where laws of 51 jurisdictions “will infuse complexity” into a class trial).

¹⁴⁶ USF Opp’n at 31.

1 have first been established (or defeated) across all cases. This is not a radical approach—it is
 2 precisely how Rule 23(c)(4) was designed to operate. This approach was also long ago adopted by
 3 the Supreme Court to streamline trials in a related discrimination context. *See Int’l Bhd. of*
 4 *Teamsters v. United States*, 431 U.S. 324, 376 (1977) (setting forth two stages for trial of disparate
 5 treatment claims: liability, followed by a remedial phase to determine individual damages).¹⁴⁷ *See*
 6 *also Tyson*, 577 U.S. at 461 (affirming certification of class under the Fair Labor Standard Act that
 7 contained over 200 uninjured members and noting that damages may be apportioned in remedial
 8 phase so that only injured members recover).

9 Nakamura argues that an issues class is not superior because “as shown by their
 10 declarations, class members do not want to be part of this case.”¹⁴⁸ Again, there is good reason to
 11 doubt the degree of “hostility” Defendants have manufactured, given the documented campaign
 12 of coercion—as reported to USF—necessary to obtain this “cookie-cutter” support.¹⁴⁹ Nakamura
 13 is also wrong to “presume” that Plaintiffs’ counsel have not been contacted by class members who
 14 are not John Does but shared their experiences.¹⁵⁰ In fact, he knows they have—he attempted to
 15 access Plaintiffs’ counsel’s privileged communications with just such people.¹⁵¹ In any event, the
 16 authorities Nakamura cites do not stand for the proposition that “hostility” defeats superiority—in
 17 both cases, the Court was concerned with how disagreements among class members would impact
 18 Rule 23(b)(3)’s inquiry into “the interest of each class member in individually controlling the
 19 prosecution or defense of separate actions.” *McDonald v. Ricardo’s on the Beach, Inc.*, No. CV
 20 11-9366 PSG (MRWx), 2013 WL 228334, at *5 (C.D. Cal. Jan. 22, 2013); *see also Leuthold v.*
 21 *Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004) (same). Here, because this case is

22
 23 ¹⁴⁷ Title VII authorities are instructive in assessing Title IX claims. *Bolla v. McClain*, 469 F. App’x
 531, 532 (9th Cir. 2012).

24 ¹⁴⁸ Nakamura Opp’n at 23. Nakamura also argues that “courts are clear that a class action may be
 25 superior ‘where damages suffered by each putative class member are not large.’” *Id.* (quoting
 26 *Zinser*, 253 F.3d at 1190). While it is true that class actions afford access to justice in cases that
 would—due to the small size of recovery—not otherwise be economically feasible, this is no bar
 to class actions where class members stand to recover more. That is particularly true where, as here,
 the process imagined would ultimately involve individualized showings of harm to access an award
 (substantial or otherwise).

27 ¹⁴⁹ Selbin Decl., Ex. 2 at USF_0115359; *id.*, Ex. 7 (Cross Dep. Tr.) at 214:9-11.

28 ¹⁵⁰ Nakamura Opp’n at 23.

¹⁵¹ *See* ECF No. 250.

brought under Rule 23(c)(4), every class member will ultimately be in complete control over their individual trial—and that will include the decision not to have one at all.

Giarratano argues that an issues class is not superior because Plaintiffs are “vague as to whether [they intend] to later certify a damages class.” *See* Giarratano Opp’n at 23 (quoting *Rahman v. Mott’s LLP*, 693 F. App’x 578, 580 (9th Cir. 2017)). Unquestionably, Plaintiffs are not vague on this point: they do not seek to certify a damages class.¹⁵² This likewise dooms Giarratano’s puzzling argument that certification is not superior because “plaintiffs ‘fail to show any model for calculating damages that [] can be applied classwide.’” *Id.* (quotation unattributed).

Finally, Defendants’ conduct continues to demonstrate that individual trials on common issues would not only be unmanageable, but unfair. As it did with Plaintiffs’ motion for class certification, USF again made a large document production—its first custodial production since November 15, 2024—only days before this brief was due. Giarratano pulled the same trick, making his *first ESI production in the case* only three days ago.¹⁵³ And as the Court knows, this comes after it took many months and several Court orders to get Defendants to produce highly relevant (or in Giarratano’s case any) documents. The best way to manage this conduct and expeditiously get these cases to trial is to certify the common issues for common liability determinations.

IV. CONCLUSION

Plaintiffs respectfully request that the issues detailed in their motion be certified pursuant to Rule 23(c)(4).

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Respectfully submitted,

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¹⁵² *See* Mot. at 2, 24-25.

¹⁵³ MvK Decl. ¶¶ 6-7, 9, 13.

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